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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/688,200	10/17/2003	Carl W. Dirk	UTSE:099US	6663
32425	7590	08/29/2008	EXAMINER	
FULBRIGHT & JAWORSKI L.L.P. 600 CONGRESS AVE. SUITE 2400 AUSTIN, TX 78701				LAUCHMAN, LAYLA G
ART UNIT		PAPER NUMBER		
2877				
		MAIL DATE		DELIVERY MODE
		08/29/2008		PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No.	Applicant(s)	
	10/688,200	DIRK, CARL W.	
	Examiner	Art Unit	
	L. G. Lauchman	2877	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1) Responsive to communication(s) filed on 10/17/03.
 2a) This action is **FINAL**. 2b) This action is non-final.
 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4) Claim(s) 1-28 is/are pending in the application.
 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
 5) Claim(s) 1-24 and 26 is/are allowed.
 6) Claim(s) 25,27 and 28 is/are rejected.
 7) Claim(s) _____ is/are objected to.
 8) Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9) The specification is objected to by the Examiner.
 10) The drawing(s) filed on _____ is/are: a) accepted or b) objected to by the Examiner.
 Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
 Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
 a) All b) Some * c) None of:
 1. Certified copies of the priority documents have been received.
 2. Certified copies of the priority documents have been received in Application No. _____.
 3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) Notice of References Cited (PTO-892)
 2) Notice of Draftsperson's Patent Drawing Review (PTO-948)
 3) Information Disclosure Statement(s) (PTO/SB/08)
 Paper No(s)/Mail Date 4/20/07; 6/21/04; 1/15/04.

4) Interview Summary (PTO-413)
 Paper No(s)/Mail Date. _____.
 5) Notice of Informal Patent Application
 6) Other: _____.

DETAILED ACTION

Specification

The disclosure is objected to because of the following informalities: On page 9, second paragraph, the brief description of Figures 13-22 should refer to each of the figures separately.

Appropriate correction is required.

Claim Objections

Claim 5 is objected to because of the following informalities: In Claim 5, the period after "4" should be deleted. Appropriate correction is required.

Claim Rejections - 35 USC § 101

35 U.S.C. 101 reads as follows:

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

Claims 25, 27 and 28 are rejected under 35 U.S.C. 101 because the claimed invention is directed to non-statutory subject matter.

As to Claim 25, the claims are directed to a judicial exception; as such, pursuant to the Interim Guidelines on Patent Eligible Subject Matter (MPEP 2106)), the claims must have either physical transformation and/or a useful, concrete and tangible result. The claim fails to include transformation from one physical state to another. The claim does not appear to be useful, concrete, and a tangible result being claimed. Merely generating a customized spectral profile would not appear to be sufficient to constitute a tangible result, since the outcome of the generating step has not been used in a disclosed

practical application nor made available in such a manner that its usefulness in a disclosed practical application can be realized. As such, the subject matter of the claims is not patent eligible.

“Claims to processes that do nothing more than solve mathematical problems or manipulate abstract ideas or concepts are complex to analyze and are addressed herein. If the “acts” of a claimed process manipulate only numbers, abstract concepts or ideas, or signals representing any of the foregoing, the acts are not being applied to appropriate subject matter. *Gottschalk v. Benson*, 409 U.S. 63, 71 - 72, 175 USPQ 673, 676 (1972). Thus, a process consisting solely of mathematical operations, i.e., converting one set of numbers into another set of numbers, does not manipulate appropriate subject matter and thus cannot constitute a statutory process.” MPEP 2106.02

As to Claim 27, the claim is drawn to a computer program per se. A computer program per se is abstract instructions. Therefore, a computer program is not a physical thing (product) nor a process as they are not “acts” being performed. As such, these claims are not directed to one of the statutory categories of invention (See MPEP 2106.01), but are directed to nonstatutory functional descriptive material.

“When nonfunctional descriptive material is recorded on some computer-readable medium, in a computer or on an electromagnetic carrier signal, it is not statutory since no requisite functionality is present to satisfy the practical application requirement. Merely claiming nonfunctional descriptive material, i.e., abstract ideas, stored on a computer-readable medium, in a computer, or on an electromagnetic carrier signal, does not make it statutory. See *>Diamond v.< Diehr*, 450 U.S. *>175,< 185-86, 209 USPQ *>1,< 8)” MPEP 2106.01

It is noted that to be statutory, instruction (e.g. program) must be embodied in sufficient structure to permit the instructions functionality to be realized. In the instant claim, since the medium comprises the instructions, it is clear that the medium is not intended to be a structure and therefore the claim is directed to instructions per se, and is non-statutory. Further, if the claim is amended to recite computer readable medium embodying instructions, the definition of computer readable medium is very broad as to encompass non-statutory embodiment as disclosed in the specification (see page 22. line 29-30: “..or in any form as long as computer... can carry out the instructions.”

As to Claim 28, the claim is directed to neither a “process” nor a “machine,” but rather embraces or overlaps two different statutory classes of invention set forth in 35 U.S.C. 101 which is drafted so as to set forth the statutory classes of invention in the alternative only. *Id.* at 1551.

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claim 28 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. The claim is directed to an optical filter, which is not a physical object but rather a set of data instructions, and is indefinite since it does not recite any structure and merely recites steps of generating a spectral profile.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claim 25 is rejected under 35 U.S.C. 102(b) as being anticipated by Ferrante (WO 01/46617). Ferrante teaches a method for generating a customized spectral profile (see page 9. lines 7-9, Claims 1 and 27).

Allowable Subject Matter

Claims 1-24, and 26 are allowed.

As to Claim 1, the prior art of record taken alone or in combination, fails to disclose or render obvious optimizing one or more of the optical indices by varying the trial source spectrum to generate the customized spectral profile, in combination with the rest of the limitations of the claim.

As to Claim 26, the prior art of record taken alone or in combination, fails to disclose or render obvious the customized spectral profile being generated by optimizing one or more optical indices by varying a trial source spectrum, and the optical indices being calculated using the trial source spectrum, in combination with the rest of the limitations of the claim.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to L. G. Lauchman whose telephone number is (571) 272-2418. The examiner's normal work schedule is 8:00am to 4:30pm (EST), Monday through Friday. If attempts to reach examiner by the telephone are unsuccessful, the examiner's supervisor Gregory J. Toatley, Jr. can be reached on (571) 272-2059, ext. 77.

The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Any inquiry of a general nature or relating to the status of this application should be directed to the TC receptionist whose telephone number is (571) 272-1562.

/L. G. Lauchman/
Primary Examiner, Art Unit 2877

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